IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 550 OF 1998

1. Prasad Gulabrao Shinde.
2. Shalinibai Gulabrao Shinde,
both residing at 245, Budhwar
Peth, Pune 411 002. ... Appellants.

Versus.

Babulal Chiranjivlal Agrawal,
resident of 246, Budhwar Peth,
Pune 411 002. ... Respondent.

Shri S.M.Railkar for the Appellants.
Shri A.G.Damle for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 4th August, 2006.

ORAL JUDGMENT.

1. An order was passed by this Court on 25th August 2005 directing that the Appeal shall be placed for final hearing. In terms of the said direction, the Appeal was taken up for final hearing on 3rd August 2006. The Appeal was heard on the following substantial questions of law:

(i) Whether the Courts below have committed an error by completely ignoring the effect of alleged breach committed by the Respondent of ad-interim order passed by the trial Court ?

(ii) Whether the Appellate Court committed an error by setting aside the decree passed

by the trial Court even after recording a finding that the Appellants/ Plaintiffs have established that they have acquired a right of easement by prescription of air and light through the windows which are fixed in the building in their property ?

2. The Appellants filed a suit for declaration and injunction. The Appellants claimed to be the owners of the property being 1/2 portion of City Survey No.245. Admittedly the property bearing City Survey No.246 owned by the Respondent is situated on the northern side of the property of the Appellants. According to the case of the Appellants, there are certain windows in existence in the building on their property atleast from the year 1935 and there is an acquisition of right of easement to enjoy air and light through the said windows. The suit was initially filed on an apprehension that as a result of construction activity commenced by the Respondent on the property bearing Survey No.246, there will be infringement of rights of the Appellants to enjoy air and light through the windows in the building. During the pendency of the suit, the plaint was amended. By the amendment it was alleged that during the pendency of the suit the Respondent has completed the construction of two floors

and a part of the third floor (ground floor, first floor and part of the second floor) abutting the property of the Appellants and while doing so the Respondent had damaged the northern wall of the Appellant. It is alleged that the Respondent has carried out construction of slab and cement concrete pillars/beams abutting the windows in the Appellants' building. It is alleged that as a result of the construction, the rights of the Appellants have been infringed. A prayer was also added for removal of construction carried out by the Respondent.

3. The suit was contested by the Respondent by filing written statement. The Respondent denied the existence of any right of easement in favour of the Appellants. The Respondent denied that by the construction which was proposed to be carried out, the right of easement of the Appellant will be affected in any manner. It was stated that the suit of the Appellant is not bonafide and in any event the Respondent has not obstructed the right to receive air and light of the Appellants. Additional written statement was filed by the Respondent after amendment of the plaint and he denied the allegations made in the amended plaint.

4. The trial Court framed various issues. The

issues framed and the findings given by the trial Court

on the said issues are as under:

Issues.	**Findings.**
1. Does plaintiff prove that due to construction of the Defendant as alleged there will be an obstruction by Defendant to the enjoyment of air and light of the Plaintiff ?	In the affirmative.
2. Does Plaintiff prove that he is entitled for the right of easement by prescription as alleged ?	In the affirmative.
3. Does Plaintiff prove that he is entitled for injun--ction ?	In the affirmative.
4. Does Defendant prove that Plaintiff filed this suit falsely ?	In the negative.
4A. Do Plaintiffs prove that after the order of temporary injunction the defendant has raised construction on the northern side wall of CTS No.245, Budhwar Peth, Pune, as alleged in para.2 of the plaint and thereby caused damage to the Plaintiffs' property ?	In the affirmative.
4B. Whether plaintiffs prove that such alleged construction has caused obstruction to enjoy light and air through the window of CTS No.245, Budhwar Peth, Pune ?	In the affirmative.
4C. Whether Plaintiff has proved that after injunction order of the Court Defendant has carried out construction of ground floor, first floor and 2nd floor and thereby caused damage to the northern wall of his property ?	

5. What order, relief and costs ? As per final order.

The trial Court passed a decree in favour of the Appellants granting perpetual injunction against the Respondent and directing the Respondents to remove construction which he had carried out on the second floor of the property adjoining to window No.2 and window No.3 on the northern and eastern wall of the Appellants' property. The Appellate Court reversed the decree. The Appellate Court framed the following points for determination:

Points.	**Findings.**
1. Whether the Plaintiffs prove that they have acquired the right of easement by prescri--ption for air and light through the windows which are fixed to their respective floors ?	Yes.
2. Whether they further prove that the construction of the defendant obstructing their enjoyment of light and air through the windows which are already in existence on their northern side wall ?	No.
3. Whether they further prove that the Defendant has raised the construction after passing the injunction order and damage to the northern wall of their property ?	No.
4. Whether they are entitled for the relief as sought for ?	No.

5. Whether the trial Court has committed wrong on facts and law while deciding the suit ? — Yes.

6. What order ? — As per final order.

5. The learned Advocate appearing for the Appellants submitted that the reports of the Court Commissioner appointed during the pendency of the suit clearly show that the construction carried out by the Respondent during the pendency of the suit abuts the northern wall of the Appellants. He submitted that the construction was carried out in breach of the order of injunction which was operating during the pendency of the suit. Inviting my attention to the finding recorded on issue No.4A, he submitted that a clear finding was recorded by the trial Court that after the order of temporary injunction, the Respondent made construction on the northern side of CTS 245 and thereby caused damage to the property of the Appellant. He also invited my attention to the finding recorded on issue No.4B. He submitted that inspite of clear finding recorded by the trial Court of breach of injunction committed by the Respondent, the Appellate Court has dealt with the said aspect in a casual manner and has observed that as construction has been carried out with the permission of the Municipal Corporation, it cannot be said that the construction is in contravention of the order of temporary injunction. He submitted that the

entire approach of the Appellate Court is erroneous as the Appellate Court held that the Respondent has maintained 45 degree angle while carrying out the construction.

6. The learned Advocate appearing for the Respondent invited my attention to the nature of the order of ad- interim injunction. He pointed that the said order did not prevent the Respondent from constructing a building on his own property. He submitted that as the Respondent has not infringed the alleged right of the Appellants of air and light through the existing windows, the construction cannot be said to be in breach of the order of temporary injunction. He submitted that even the Trial Court has not recorded a clear finding that the Respondent has committed breach of order of injunction. He submitted that there is absolutely no merit in the contention raised by the Appellants that there was breach committed by the Respondent of the order of temporary injunction granted by the trial Court. He submitted that there is no need to interfere with the findings recorded by the Appellant Court on merits of the controversy.

7. I have considered the submissions. On 18th April 1977 the trial Court passed an ad-interim order which reads as under:

"Read application Exh.5 supported by affidavit. Perused the papers. Heard learned Advocate for Plaintiff Shri Tile. Issue ad- interim injunction against Defendant restraining him from making any construction which will obstruct Plaintiff's alleged right of taking light and air through the windows existing in the northern and eastern wall of the Plaintiff's house. Defendant should not do any construction which will cause damage to Plaintiff's northern and eastern wall. Issue show cause notice to the Defendant returnable on 25.4.77. E.P.allowed."

It appears that the parties filed a joint pursis stating therein that the application at Exh.5 should be heard along with the suit. Thus by consent of the parties ad-interim order passed on 18th April 1977 operated till the suit was decided. On a plain reading of the order, it is seen that there was no absolute prohibition against the construction of the building. However, the Respondent was restrained from making any construction which will have the result of obstructing the right of the Appellants of taking light and air through the windows existing in the northern walls of the

Appellants' house. It was also provided that the Respondent should not do any construction which will cause damage to the Appellants' northern and eastern wall. Thus the injunction was for preventing the Respondent from carrying out construction in such a manner that a damage is caused to the property of the Appellants and especially the northern and eastern side walls of the property bearing City Survey No.245. The trial Court has recorded a finding that the Respondent admitted that he carried out the construction of the ground floor, first floor and a part of second floor during the pendency of the suit. My attention has been invited by the Advocate for the Appellant to certain portion of cross-examination of the Respondent which reads thus:

> "It is not true that after ad-interim order of the court passed below the Exh.5, I stopped the construction for some period and again started in the year 1984. I do not know when I carried out construction in my property near the windows in dispute of plaintiff's wall. It is true that photo of Exh.117 is of window in dispute of 2nd floor of plaintiff's wall and in the said photograph the construction of slab which can be seen in the said photo is of my

property. The construction which is photograph Exh.118 can be seen is of my property and is close to the window of plaintiff's wall. It is true that in Exh.119 the construction of which is 9" is width of my property. It is true that in all the photographs Exhs.135 to 138 the construction of the wall of my property can be seen and in photographs Exh.106, 135 and 136 **I have to break roof of the Plaintiff's house from the northern side.**"(Emphasis supplied)

From the statements made in the cross-examination, it is clear that the Respondent has admitted that he had to break the roof of the Appellants' house while construction was being carried out by the Respondent during the pendency of the suit. The learned Advocate for the Appellants invited my attention to copies of various photographs exhibited on record of the suit which are referred to in the cross examination of the Respondent. He pointed out that admittedly construction has been carried out after damaging the northern wall of the building of the Appellants thereby infringing the order of temporary injunction. I am not referring to the photographs which have been admitted in evidence considering the nature of the order which I propose to

pass. However, the photographs are certainly relevant for deciding the issue of breach of injunction.

8. In both the Courts below it was specifically argued on behalf of the Appellants that there was a breach committed by the Respondent of the order of temporary injunction. Though the trial Court has recorded affirmative findings on issue No.4A and 4B, the discussion made by the trial Court is far from being satisfactory. The Appellate Court in paragraph 17 of the Judgment has held thus:

> "17. From the pleadings of the Plaintiffs, they have tried to establish the fact that the defendant has raised the construction after issuing the injunction order. The injunction orders have been issued to the defendant not to carry the proposed construction. There is no specific pleading of the plaintiffs and that evidence straightway to come to the conclusion that the defendant has breached the order of the Court and there is no reason for penalising the defendant. The defendant has raised the construction as per the plan of the competent authority and this itself show that no breach has been committed by the Defendant. There

is no reason to penalise the defendant."

In my view when allegation was specifically made in the amended plaint regarding carrying out the construction in breach of the order of temporary injunction, the case ought to have been considered by the Courts below with all seriousness as the allegation was as regards the deliberate breach of the interim order of injunction which was continued by consent of the parties till the disposal of the suit. Under Rule 11 of Order XXXIX of the Code of Civil Procedure, 1908 if there is a deliberate breach on the part of the Defendant of any order passed by the Court, there is a discretionary power vesting in the Court to strick out the defence of the Defendant. This is a case where construction was carried out of ground floor, first floor and part of the second floor by the Respondent during the pendency of the suit. The question which was framed by the first Appellate Court was whether the construction has resulted in obstructing the right to receive air and light and more particularly whether the construction has caused any damage to the Appellants' northern and eastern wall. In the cross-examination the Respondent has admitted that after the interim order of injunction was passed, he stopped the construction work for sometime and thereafter he proceeded with the construction. From the reports of the Court Commissioner it appears that there is some material on

record to show that the construction made by the Respondent is very close to the wall of the house of the Appellants. When a specific case was made out as regards damage to the property of the Appellant by amending the plaint, the Appellate Court could not have brushed aside the same by simply observing that the Defendant has raised the construction as per the plan of the competent authority, which itself shows that there was no breach committed by the Respondent and therefore, there is no reason to penalise the Respondent. The Appellate Court has not addressed itself to the question as to whether any damage has been caused to the Appellants' building while carrying out the construction by the Respondent which was sought to be prevented by passing an injunction order.

9. The parties have led evidence on the aspect breach which ought to have been considered by the Appellate Court. If the allegation was of the breach of the order of temporary injunction, the same should have been viewed seriously by the Courts below, especially by the Appellate Court. For recording a finding on the question whether that there was a breach committed, the evidence on record will have to be appreciated. Apart from the oral evidence, there is documentary evidence in the form of reports of the Court Commissioner and the photographs. The first Appellate Court is the last

Court of facts and it was the duty of the first Appellate Court to examine the material on record in the context of the allegations of the Appellants as regards the breach of order of temporary injunction committed by the Respondent and to record a proper finding. However, the Appellate court has not considered the aforesaid evidence and has failed to perform its duty as the last court of facts. The Appellate Court was required to decide the point No.3 for consideration after adverting to the oral and documentary evidence on record. In this view of the matter, there is no other option but to set aside the Judgment of the Appellate Court and direct the Appellate Court to decide the Appeal afresh in the light of the observations made in this judgment.

10. Hence the following order is passed:

(i) The impugned Judgment and Decree of the Appellate Court is quashed and set aside. Civil Appeal No.563 of 1991 is restored to file of the District Court, Pune.

(ii) The parties are directed to appear before the learned District Judge, Pune, on 11th September 2006 at 11.00 a.m. for deciding the schedule of hearing of the Appeal. The learned District Judge will himself hear the

Appeal or will assign the same to any other Court as per administrative convenience.

(iii) The Appeal will be decided afresh in the light of the observations made by this Court in this judgment. The Appellate Court is expected to hear and decide the Appeal as expeditiously as possible and preferably on or before 31st January 2007.

(iv) It is made clear that no notice of the date fixed of the hearing of the Appeal before the District Court will be given to both the parties and the parties are expected to appear on the date fixed. It is also made clear that the interim relief, if any, which was operating during the pendency of the Appeal in the District Court stands restored.

(v) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.